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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-279

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

FLORIDA EAST COAST RAILWAY COMPANY and
SEABOARD COAST LINE RAILROAD COMPANY

On Appeal from the United States District Court for the Middle District of Florida

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MOTION TO AFFIRM OF FLORIDA EAST COAST RAILWAY COMPANY

Pursuant to Rule 16(1) of the Rules of this Court, Florida East Coast Railway Company moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (322 F. Supp. 725) enjoining the application to plaintiffs below [1] of an order of the Interstate Commerce Commission requiring payment of "incentive" per diem charges, in addition to the payment of normal per diem rental, for the use of unequipped boxcars during the period September through February of each year.

The order is the product of a rule-making proceeding under section 1(14)(a) of the Interstate Commerce Act. Section 1(14)(a) authorizes the Commission to fix the compensation to be paid by railroads for the use of freight cars only "after hearing." In the administrative proceeding leading to adoption of the order, the Commission limited the evidence of opponents to the Commission's proposal for imposition of incentive per diem charges to the submission of written representations. The Commission refused the request of FEC for a hearing at which FEC proposed to produce, under subpoena, testimony of Commission employees to contradict assertions of fact relied upon to support prescription of incentive per diem charges, and to cross-examine other Commission employees with respect to the studies relied upon to support the Commission's conclusions. The Commission also denied FEC's request for oral argument.

The district court held that, since the Commission was authorized by section 1(14)(a) to act only after hearing, the Commission could not under section 556 (d) of the Administrative Procedure Act refuse a

[1] Plaintiffs were Florida East Coast Railway Company ("FEC") and Seaboard Coast Line Railroad Company ("Seaboard").

hearing and deny cross-examination if a party was prejudiced thereby. The court held that the facts of the instant case "demonstrate that the plaintiffs herein were prejudiced by the summary procedures of the Commission" (J.S. p. 7a). With respect to FEC, the district court pointed out that "FEC sought to disclose a number of deficiencies in the Commission's order by presentation of evidence and cross-examination of the employees of the Commission who directed and prepared the studies relied upon in reaching the Commission conclusions" (J.S. p. 8a). The court, referring to the requests of FEC and Seaboard to the Commission for hearing, concluded "Without discussing in detail the grounds there urged as requiring a hearing, we are of the clear view that these assertions demonstrate the prejudice to Seaboard and FEC arising from the Commission's failure to provide hearings" (J.S. p. 8a).[2]

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. This case presents a single issue: whether FEC was prejudiced by the refusal of the Commission to allow FEC to present the proffered testimony and to cross-examine Commission employees. Resolution of this factual issue by the court below did not involve application of uncertain or disputed principles of law. The issue was correctly decided by the district court and the judgment of that court should be affirmed.

1. The Government asserts a conflict between the decision below and that in *Long Island R.R.* v. *United*

[2] This disposition of the case made it unnecessary for the district court to decide other grounds upon which plaintiffs challenged the lawfulness and validity of the Commission's order (J.S. p. 5a).

States, 318 F. Supp. 490 (E.D. N.Y. 1970). Examination of the two decisions demonstrates that there is no conflict in the principles of law applied by the two courts. Both courts held that the Commission proceeding was governed by the procedural requirements imposed in sections 556 and 557 of the Administrative Procedure Act (J.S. pp. 127a-128a, 131a and J.S. p. 6a). Both held that, under section 556(d) of the APA, the procedure employed by the Commission would be unlawful if a party was "prejudiced thereby" (J.S. p. 134a and J.S. p. 6a). Both held prejudice was established if a party pointed out "any respect in which the Commission's disclosure of greater detail or cross-examination of the Commission's staff was needed to enable it to mount a more effective argument against the Commission's proposal" (J.S. p. 136a and J.S. p. 7a). The difference in the result reached by the court below and that in *Long Island* was the consequence of the difference in the factual showing made in the two cases. In *Long Island,* the court held that the railroad had not "pointed to specifics on which it needed to cross-examine or present live rebuttal testimony."[3] It would have been, the court said, a "different case" if such a showing had been made (J.S. p. 136a). In the instant case, the court concluded that the FEC had, as a matter of fact, pointed to specifics on which cross-examination and live testimony was needed (J.S. pp. 7a-8a).

2. FEC requested hearing in order to compel testimony from the employees of the Commission who supervised and directed the study upon which the Commission relied in reaching its conclusions respect-

[3] The request of the Long Island for hearing to which the district court refers (J.S. p. 126a) is reproduced as Appendix A *infra.*

ing the adequacy of car supply and to present the testimony of Commission employees experienced in matters affecting freight car supply. FEC's request to the Commission for hearing specified that FEC expected to establish, among others, four specific, factual points by such cross-examination and testimony.[4]

Counsel for the Government now assert that the questions FEC sought to have answered through cross-examination of Commission staff were so worded that the Commission "would readily have agreed with" each fact without changing any of its conclusions (J.S. p. 16). This argument is, as the court below correctly held, "wide of the mark." Neither Government counsel nor a reviewing court can know what facts the Commission "would" have agreed with or what conclusions it "would" have reached in the face of such testimony. The Commission itself expressed

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[4] FEC's request stated, in part:

> FEC expects to establish, by cross-examination of such persons, the following facts, among others:
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> a. Deficiencies reported in the study conducted by the Commission may not be affected by the supply of cars available at a reporting station, on a reporting railroad, or in a statistical region.
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> b. Railroad ownership of additional plain box cars would not necessarily change the results summarized in the appendices to the interim report.
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> c. No computation has been or can be made on the evidence before the Commission in this proceeding of the number of additional box cars that would be needed to furnish on the day ordered all plain box cars at all stations during the period September 1 through February 28 of each year.
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> d. It is unreasonable to expect rail carriers to supply for loading within 24 hours a plain box car in all instances.
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> (J.S. pp. 47a-48a)

no such reason for denying FEC's request. The Commission's report, in fact, gives no explanation whatever for denying the request for oral hearing. The Commission's report says only that "No party has been prejudiced by the submission here of all the evidence in written form; and the verified statements and the replies thereto received by this agency accord the parties a hearing under section 556 of that [Administrative Procedure] act" (J.S. p. 87a). Moreover, FEC's burden in the reviewing court is not to establish that the evidence it proposed to produce at the oral hearing would have, if received, compelled the agency to reach contrary conclusions. FEC was entitled to a fair opportunity to develop a record to persuade the agency not to impose incentive charges, as well as a full record for judicial review of an adverse result. FEC established that it was prejudiced by the procedure requiring submission of all evidence in writing by demonstrating that the procedure precluded FEC from presenting relevant and material evidence in support of its position in opposition to incentive per diem charges.

3. In the context of the proceeding and in the light of the findings expressed by the Commission, the testimony and cross-examination FEC sought was material and relevant to the agency determination under section 1(14)(a) of the Interstate Commerce Act. The interim report of the Commission (J.S. p. 51a) proposing imposition of incentive per diem charges depended upon a conclusion that a nationwide shortage of unequipped boxcars exists during the six-month period September through February of every year.[5]

[5] Section 1(14)(a) provides, in part: "The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate . . . ."

A study attached to the interim report prepared by the staff of the Commission was the basis for this conclusion. The study was based upon periodic reports filed during 1968 by individual railroads in response to questionnaires designed by the Commission's staff. The individual reports listed by station for selected dates the number of cars requested by shippers to be placed for loading, the number actually placed, and the number of empties at that station and at other stations on the reporting railroad. The staff study summarized the data by six geographic zones. The study claimed both a failure to fill shipper orders for plain boxcars (a deficiency) and, at the same time, a large surplus of empty plain boxcars within the same geographic zones (J.S. p. 68a). The Commission asserted that improved efficiencies in use, movement, and return of boxcars would not, in its judgment, eliminate reported deficiencies during the winter months (J.S. pp. 69a-70a). The Commission concluded that shortages "probably" could be relieved only by an increase in the total number of plain boxcars (J.S. p. 70a). The Commission concluded that the imposition of incentive per diem charges "should tend" to speed up the use, movement, and return of foreign cars, produce a flow of funds for creditor roads to purchase needed equipment, and "might tend" to encourage acquisition of additional boxcars by carriers in every part of the country (J.S. p. 54a).

The final report of the Commission adopted these findings and conclusions of the interim report (J.S. p. 88a). In affirming its interim conclusion to impose incentive per diem, the Commission disposed of a number of issues by holding that the rail carriers had the burden of proving the negative of the as-

sumptions made in the interim report and that the carriers had not discharged that burden. For example, the Commission held the railroad respondents had the burden, but had failed to present evidence to demonstrate that incentive per diem would not improve car utilization (J.S. pp. 90a, 92a); that the financial impact of incentive per diem would be unduly burdensome (J.S. pp. 92a n. 8, 101a-102a); and that the general purpose boxcar is not the "workhorse" of the fleet (J.S. p. 92a).

The testimony FEC sought to compel would have tested the validity of the study upon which the Commission relied and established facts contradicting the Commission's assumptions relating to car supply. The testimony could not have been presented by FEC in written form because the information was in the exclusive possession and knowledge of the Commission's employees proposed to be subpoenaed.

FEC proposed to demonstrate through the Commission staff that the "deficiencies" in furnishing boxcars, reported by the individual railroads and tabulated in the study upon which the Commission relied to make the essential finding of inadequate car supply, may not be affected by the number of boxcars owned by the railroad or by any regional group of railroads. The reports designed by the Commission staff required each railroad to show as a "deficiency" the failure to supply a car on the day requested by the shipper no matter when the request was received. For example, a request received at noon for a boxcar that same day would produce a reported deficiency unless the car was supplied that day (J.S. pp. 66a-67a). Train schedules and switch engine crew assignments may, and frequently do, prevent placement of a car

upon short notice even at locations served every day. Many branch lines are served only once or twice a week, but a request for a boxcar on a day that no service was scheduled would also be recorded as a deficiency. FEC proposed to show, therefore, that the reported "deficiencies" tabulated in the study were the result of train service schedules rather than lack of cars and that reported deficiencies may not be affected by the supply of cars available at a station, on a railroad, or in a statistical region. The record as made before the Commission suggests that the number of reported deficiencies because of train schedules was quite substantial.[6] Although the Commission's Bureau of Enforcement conceded in the proceeding that orders for car placements on a day when no service was scheduled should not have been counted as orders for cars on that day,[7] such "deficiencies" were not excluded from the reports or the study. In the absence of the requested cross-examination, there was no way to determine whether, or to what extent, the reported deficiencies were the result of inadequate car supply or service factors unrelated to car ownership. The importance of this showing, both in terms of the Commission proceeding and of judicial review of the Commission's decision, is emphasized by the Commission's reliance on any reported "deficiency" in placing cars as evidence that the railroads owned an inadequate number of plain boxcars (J.S. p. 89a).

FEC also proposed to present, on this point, testimony of Commission car service experts to show

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[6] The record in the proceeding shows, for example, that 25 to 30 percent of all stations on the Penn Central are served on less than a daily basis and that this fact affected the deficiencies reported by that railroad (Verified Statement of Andrew Weamer).

[7] Bureau Reply Brief, p. 7.

that reports of "deficiencies" such as those used in the staff study are substantially affected by shipper practices of overordering cars or placing duplicate orders with two or more railroads, particularly during the fall and winter grain harvest in the Midwest.[8] FEC proposed to cross-examine the service agents upon whom the Commission relied to conclude that the reports were 91.7 percent free of any "duplication or inflation in the car orders reported" (J.S. pp. 65a-66a). The accuracy of this conclusion is important because inflated, duplicative, or repetitious orders for cars drastically distort the number of reported shortages and deficiencies. The requested cross-examination would have disclosed whether the agents took into account the fact that shippers frequently "cancel"

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[8] For example, Howard S. Kline, Chief of the Open Car Branch, Section of Car Service, Bureau of Railroad Safety and Service of the Commission, had stated under cross-examination in 1966:

> Q. You have indicated that you know, then, of a practice of shippers to order more cars than they actually need, to request the carrier to place more cars than they actually need, under such circumstances.
>
> A. Yes.
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> • • • • •
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> Q. Could you test it perhaps by a sampling procedure to deal with the shippers themselves, and compare their actual shipments over a period of time with their placing of orders for the placement of cars?
>
> A. No, because I do not think there is too much connection between the car shortages as reported by shippers, and their shipments. Our men have turned in reports any number of times of elevator men with plugged elevators, that had a siding that would hold five cars, and still they are ordering 20 cars a day. What would they do with the other 15?
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> (Transcript of Hearings on November 2-3, 1966 in Ex Parte 252, pp. 167, 275-276)

orders only after the day the cars are to be placed. Only cross-examination would have disclosed how, if at all, the Commission agents auditing carrier A could determine that shippers had not placed duplicating orders with carrier B. The presentation of testimony from Commission experts respecting such practices, as well as cross-examination of the audits, was neither frivolous nor without reasonable foundation. In Ex Parte No. 241, *Investigation of Adequacy of Freight Car Ownership,* 335 I.C.C. 264 (1969), the parties unanimously agreed, and the Commission found, that the reported car shortages in that proceeding had to be reduced *at least 50 percent* to compensate for over-ordering by shippers (335 I.C.C. at 305-306).

FEC requested hearing to show, also through Commission staff experts, that acquisition of additional plain boxcars by the railroads would not necessarily alleviate reported shortages and deficiencies. FEC presented evidence in its possession that increases in the number of plain boxcars would only exacerbate the imbalance of empty plain boxcars on FEC's line, resulting in decreased efficiency in car utilization and increased incentive per diem obligations (Verified Statement of R. P. Taylor, pp. 6-7). FEC proposed to show, through the testimony of Commission staff members with long experience in freight car service matters, the extent to which inefficient car utilization on a national basis would be a likely product of increased car supply. This evidence was directly relevant to the statutory duties of the Commission under section 1(14)(a) of the Act. Section 1(14)(a) authorizes imposition of incentive per diem only if the Commission finds such charges, among other things, "will . . . contribute to sound car service practices

(including efficient utilization and distribution of cars) . . . ." The only basis the Commission, as proponent of the rule, offered in its interim report to satisfy its statutory burden of finding that more efficient car utilization and distribution would evolve was an expression of conditional, qualified hope that incentive charges "may," "should," "might" produce this desired result (J.S. pp. 54a, 57a). But, in the end, the Commission had to concede that it did not know whether incentive per diem would work at all (J.S. p. 61a). The tack the Commission took in its final report concerning the effect of incentive per diem was simply to shift the evidentiary burden from the Commission as the proponent of the regulation to respondent railroads. The Commission held:

> No evidence was produced by these parties beyond the opinions of certain railroad officials . . . that the proposed scale would be ineffective as an incentive. (J.S. p. 92a)

This conclusion by the Commission underscores the prejudice FEC sustained when the Commission refused an oral hearing at which FEC proposed to present the testimony of non-railroad witnesses on these critical issues.

FEC had reasonable grounds to believe that Commission staff members experienced in freight car supply problems would have testified that the statistics summarized in the interim report were insufficient to support a determination as to what constitutes an adequate car supply or how many additional general purpose boxcars were needed to remedy deficiencies found to exist. Mr. H. S. Kline, the Commission's expert on freight car supply, had stated in other proceedings that a supply of cars adequate to furnish all

shippers cars within 24 hours of their request would be so large that rail traffic would come to a standstill from the resulting congestion (Transcript of Ex Parte 241 Hearings, pp. 1235-1236). The Commission, in effect, reached the same conclusion in the 1967 decision in Ex Parte 252 (332 I.C.C. at 13). Yet, the standard applied by the Commission in this proceeding was even more stringent—the ability or failure of railroads to place cars for loading at the time requested even if the request for service was made on the same day (J.S. p. 89a).

FEC had every reason to believe further that responsible staff members of the Commission would have testified that it is unreasonable to measure the adequacy of freight car supply, particularly in periods of heavy grain harvests, by the ability of railroads to furnish plain boxcars upon request regardless of how preemptory the request. Responsible officials of the Commission had repeatedly stated at other times and in other proceedings that a service standard requiring placement of cars upon 24 hours' notice was unreasonable and particularly so during harvest time (*E.g.*, Transcript of Ex Parte 241 Hearings, pp. 356-358, 1234-1236; Transcript of Ex Parte 252 Hearings, pp. 256-257). The acquisition and maintenance of a "car supply adequate to meet the needs of commerce" is, under section 1(14)(a), an essential part of the standards for Commission imposition of incentive per diem. The reasonableness of the standard applied by the Commission to measure adequacy of car service is thus directly relevant to the statutory authority under which the Commission acted.

4. FEC is a small, terminating railroad operating along the east coast of Florida. The efficiency and

dispatch with which FEC now moves freight cars, including plain boxcars, are unmatched by any other railroad.[9] FEC has thus far avoided the financial disaster that now threatens the continued existence of railroad service on much of the eastern seaboard of the United States. The record in this proceeding shows that the incentive per diem charges prescribed by the Commission would increase the car hire costs of FEC by an amount exceeding the net railway income of FEC in 1967 and 1968 (Verified Statement of E. L. Masters, App. B; Verified Statement of R. P. Taylor, p. 3). The Commission refused to increase revenues of the terminating lines or to exempt them from payment of incentive per diem charges (J.S. pp. 100a, 103a). Faced with such a threat to its financial stability, FEC is entitled to insist upon an opportunity to make an evidentiary record to persuade the agency not to impose such charges or, if imposed, to convince a reviewing court that the Commission decision was unlawful. The decision of the court below poses no threat to any national plan to secure adequate freight car service. The incentive per diem is, in fact, in effect except as to the plaintiffs in this action. The court below has simply acted to implement the basic rights to which FEC is entitled under both the Interstate Commerce Act and Administrative Procedure Act.

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[9] Verified Statement of R. P. Taylor, pp. 4-6, comparing FEC car mileages with other carriers.

The "car distribution directions" referred to in the Government's jurisdictional statement (J.S. p. 14) are issued by the staff of the Commission to specify the connecting line to which FEC is to deliver empty cars in order that the cars may be sent to a particular region. Under existing car service rules, FEC may return empty cars only to the connecting line from which the cars were received under load. The car service directions override these car service rules.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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